No. 89-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY OF THE COMMONWEALTH OF VIRGINIA

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QUESTIONS PRESENTED

1. Whether state discrimination between religious and secular wedding officiants violates the Establishment Clause of the First Amendment of the United States Constitution?

2. Whether a state's conditioning of the performance of public functions upon adherence to religious beliefs violates the Free Exercise Clause of the First Amendment of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	11
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Federal

Abington School District v. *Schempp*, 374 U.S. 203 (1963) 6

Bowen v. *Kendrick*, 487 U.S. ____, 108 S. Ct. 2562 (1988) 7

County of Allegheny v. *American Civil Liberties Union*, ____ U.S. ____, 109 S. Ct. 3086 (1989) 6

Epperson v. *Arkansas*, 393 U.S. 97 (1968) 6

Everson v. *Board of Education*, 330 U.S. 1 (1947) 4, 7

Gillette v. *United States*, 401 U.S. 437 (1971)..... 6

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 7

School District of Grand Rapids v. *Ball*, 473 U.S. 373 (1985) 6-7

Texas Monthly, Inc. v. *Bullock*, 489 U.S. ____, 109 S. Ct. 890 (1989) 7

Torcaso v. *Watkins*, 367 U.S. 488 (1961)..... 6, 10

United States v. *Ballard*, 322 U.S. 78 (1944)..... 10

Wallace v. *Jaffree*, 472 U.S. 38 (1985) 4, 6

Welsh v. *United States*, 398 U.S. 333 (1970)..... 6

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624 (1943) 10

States

Cramer v. *Commonwealth*, 214 Va. 561, 202 S.E. 2d 911, *cert. denied*, 419 U.S. 875 (1974)..... 5

In re Application of Jack Ginsburg, 236 Va. 165, 372 S.E. 2d 387 (1988)..... 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. ..... *passim*

STATUTES

Federal

28 U.S.C. § 1257(a)..... 2

State

Ala. Code 30-1-7 (1988)..... 8, 9

	Page
Alaska Stat. 25.05.261 (1988)	8
Ariz. Rev. Stat. Ann 25-124 (1988)	8
Ark. Stat. Ann. 9-11-213 (1987)	8, 9
Cal. Civil Code 4205 (West 1989)	8
Col. Rev. Stat 14-2-109 (1987)	8
Conn. Gen. Stat. Ann. 46b-22 (West 1989)	8
Del. Code Ann. tit. 13, 106 (1988)	8
D.C. Code Ann. 30-106 (1988)	8
Fla. Stat. Ann. 741.07 (West 1986)	8
Ga. Code Ann. 19-3-30 (Michie 1989)	8
Haw. Rev. Stat. 572-12 (1985)	8
Idaho Code 32-303 (1988)	8, 9
Ill. Rev. Stat. ch. 40, para. 209 (1987)	8
Ind. Code Ann. 31-7-5-1 (Burns 1986)	8
Iowa Code Ann. 595.10 (West 1989)	8
Kan. Stat. Ann. 23-116 (1987)	8
Ky. Rev. Stat. Ann. 402.050 (1984)	8
La. Rev. Stat. Ann. 9:202 (West 1989)	8, 9
Me. Rev. Stat. Ann. tit. 19, 121 (1988)	8, 9
Md. Family Law Code Ann. 2-406 (1984)	8, 9
Mass. Ann. Laws ch. 207, 38 (Law. Co-op 1989)	8, 9
Mich. Comp. Laws Ann. 551.7 (West 1988)	8, 9
Minn. Stat. Ann. 517.04 (West 1989)	8, 9
Miss. Code Ann. 93-1-17 (1988)	8, 9
Mo. Ann. Stat. 451.100 (Vernon 1986)	8, 9
Mont. Code Ann. 40-1-301 (1988)	8, 9
Neb. Rev. Stat. 42-108 (1988)	8, 9
Nev. Rev. Stat. 122.062 (1985)	8, 9
N.H. Rev. Stat. Ann. 457:31 (1983)	8, 9
N.J. Stat. Ann. 37:1-13 (West 1989)	8, 9
N.M. Stat. Ann. 40-1-2 (1988)	8, 9
N.Y. Dom. Rel. Law 11 (McKinney)	8, 9
N.C. Gen. Stat. 51-1 (1988)	8, 9
N.D. Cent. Code 14-03-09 (1989)	8, 9
Ohio Rev. Code Ann. 3101.8 (Anderson 1989)	8, 9
Okla. Stat. Ann. tit. 43, 7 (West 1989)	8, 9

	Page
Or. Rev. Stat. 106.120 (1984)	8, 9
Pa. Stat. Ann. tit 48, 1-13 (Purdon 1989)	8, 9
R.I. Gen Laws 15-3-5 (1988)	8, 9
S.C. Code Ann. 20-1-20 (Law. Co-op. 1988)	8, 9
S.D. Codified Laws Ann. 25-1-30 (1989)	8, 9
Tenn. Code Ann. 36-3-301 (1988)	8, 9
Tex. Fam. Code Ann. 1.83 (Vernon 1989)	8, 9
Utah Code Ann. 30-1-6 (1989)	8, 9
Vt. Stat. Ann. tit 18, 5144 (1987)	8, 9
Va. Code Ann. 20-23 (1988)	*passim*
Va. Code Ann. 20-25 (1988)	3, 5, 8, 9
Va. Code Ann. 20-26 (1988)	3, 8, 9
Wash. Rev. Code Ann. 26.04.050 (1989)	8, 9
W.Va. Code 48-1-12 (1986)	8, 9
Wis. Stat. Ann. 765.16 (West 1988)	8, 9
Wyo. Stat. 20-1-106 (1987)	8, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY OF THE COMMONWEALTH OF VIRGINIA

Roy R. Torcaso petitions for a writ of certiorari to review the judgment of the Circuit Court of Prince William County of the Commonwealth of Virginia in this case.

OPINIONS BELOW

The order denying Mr. Torcaso's Petition for Appeal to the Virginia Supreme Court was not reported and is reprinted in the Appendix hereto at App. 1a. The order of the Circuit Court of Prince William County denying the relief requested

by Mr. Torcaso was not reported and is reprinted in the Appendix hereto at App. 2a.

JURISDICTION

The judgment of the Circuit Court of Prince William County was entered on December 16, 1988. The Petition for Appeal to the Supreme Court of the Commonwealth of Virginia was denied on June 8, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Establishment Clause and the Free Exercise Clause of the First Amendment to the United States Constitution provide:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Section 20-23 of the Code of Virginia provides:

> When a minister of any religious denomination shall produce before the circuit court of any county or city in this State, or before the judge of such court or before the clerk of such court at any time, proof of his ordination and of his being in regular communion with the religious society of which he is a reputed member, or proof that he holds a local minister's license and is serving as a regularly appointed pastor in his denomination, such court, or the judge thereof, or the clerk of such court at any time, may make an order authorizing such minister to celebrate the rites of matrimony in this State. Any order made under this section may be rescinded at any time by the court or by the judge thereof.

STATEMENT OF THE CASE

Petitioner Roy R. Torcaso is a member of the American Humanist Association ("AHA"), a non-profit educational and philosophical organization. Since 1972 he has been an accredited "Humanist Counselor" in Maryland, Virginia, and

the District of Columbia. Humanist Counselors—the AHA's counterpart to priests, pastors, and rabbis—solemnize marriages, provide moral counseling, and preside over other rites of passage for AHA members. As an AHA Counselor, petitioner has performed weddings in Pennsylvania, Maryland, and the District of Columbia.

On November 14, 1988, petitioner applied to Prince William County, Virginia, for authority to perform weddings under Section 20-23 of the state's Code, which provides that "minister[s] of any religious denomination" may be authorized to perform marriages.[1] The clerk denied the application, and petitioner sought review by the Circuit Court of Prince William County. He submitted documents showing that he had served as a Humanist Counselor since 1972, that he had remained active within the AHA during the intervening years, and that he had been requested to perform a wedding in Virginia. Without hearing or argument, the court denied petitioner's request on the ground that "said application does not meet any of the requirements of Section 20-23 . . . ." (*See* Appendix 2a.)

Mr. Torcaso filed a Petition for Appeal to the Virginia Supreme Court. He urged that § 20-23 of the Code could be upheld as constitutional only if it were interpreted not to condition his eligibility to perform weddings upon the adher-

[1] This was petitioner's second application for authority to perform weddings under the statute. The first application was made following a request by an AHA member that petitioner officiate at his wedding in Virginia. The Circuit Court of Arlington County denied the application, and the parties were married without petitioner's assistance. Shortly after making his second application, petitioner was again asked to perform a wedding in Virginia.

Section 20-23 of the Virginia Code is the only Virginia statute under which petitioner, a Maryland resident, could apply for such authority. Other sections of the Virginia Code limit the power to perform weddings to (i) Virginia judges or certain qualifying residents who post a bond (§ 20-25) and (ii) religious institutions (§ 20-26).

ence to religious beliefs, and invited such an interpretation of the statute. If, on the contrary, the statute were read to impose religious requirements, petitioner argued it would offend the Establishment Clause and the Free Exercise Clause of the First Amendment, and other provisions of the United States and Virginia constitutions. A panel of the Supreme Court of Virginia heard oral argument on May 26, 1989, on the question whether an appeal should be permitted, and denied the Petition for Appeal without opinion on July 8, 1989 (*See* Appendix 1a.)

REASONS FOR GRANTING THE WRIT

Section 20-23 of the Virginia Code imposes a religious qualification in determining who is eligible to solemnize marriages. Although petitioner serves his own community in the same capacity as ordained ministers serve their parishioners, Virginia denies him the authority to solemnize marriages that it freely grants to his religious counterparts. Such discrimination between religious and non-religious beliefs and affiliations unquestionably offends this Court's decisions applying the Establishment Clause, which prohibits states from enacting laws "respecting an establishment of religion . . . ." *Everson* v. *Board of Education*, 330 U.S. 1, 15-18 (1947); *Wallace* v. *Jaffree*, 472 U.S. 38, 48-55 (1985).

Virtually all states have enacted marriage solemnization laws resembling Virginia's. But other states have saved their laws from constitutional infirmity by applying them so as to make persons like petitioner eligible to perform weddings. The Virginia courts have declined the opportunity to follow that course here. Accordingly, this Court should grant certiorari because the decision below conflicts with this Court's decisions holding that the Establishment Clause and the Free Exercise Clause of the First Amendment forbid discrimination on the basis of religious belief and affiliation.

1. The only plausible basis for Virginia's denying petitioner permission to perform marriages under § 20-23 of the

Virginia Code was his inability to satisfy one of the four requirements imposed by statute: affiliation with "any *religious* denomination."[2] Petitioner submitted uncontested evidence that he was the secular equivalent of a religious minister,[3] and he clearly satisfied all statutory requirements except the "religious denomination" test.[4] Thus petitioner and AHA members were denied the same benefits that are accorded to Baptists, Catholics, and other conventional "religious denominations." Although ministers of religious denominations who reside anywhere in the world may be authorized to perform marriages in Virginia, Humanist Counselors must either be judges or reside in the county where they seek to perform the marriage and post a $500 surety bond.[5]

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[2] Emphasis added. Under Section 20-23 the applicant must (i) be a "minister" (ii) of "any religious denomination" (iii) who submits proof of ordination, and (iv) is in regular communion with a congregation.

[3] The documents submitted *pro se* by Mr. Torcaso included a personal statement about his role and duties as an AHA Counselor and a letter from Arthur M. Jackson, Executive Director of AHA's Division of Humanist Counseling, confirming the date of petitioner's investiture and the functions that he had performed as Counselor. These documents are included in the record below.

[4] Petitioner's duties as a Humanist Counselor easily satisfy the standard for qualifying as a "minister." *See In re Application of Jack Ginsburg*, 236 Va. 165, 372 S.E.2d 387 (1988) ("minister" broadly defined to include anyone with administrative or other duties); *Cramer v. Commonwealth*, 214 Va. 561, 565, 202 S.E.2d 911, 914, *cert. denied*, 419 U.S. 875 (1974) ("minister" is person "selected in accordance with the ritual, bylaws or discipline of the order").

Petitioner also satisfies the "ordination" requirement, which requires merely that he show that he has been appointed to a position within the organization. *Ginsburg*, 372 S.E.2d at 389. Petitioner's uncontradicted proof of active participation as a Humanist Counselor easily fulfills the "regular communion" test, which requires only "mutual participation," "joint or common action," or "a function performed jointly." *Id.*

[5] Section 20-25 of the Virginia Code.

The Establishment Clause prohibits states from discriminating in this way between religious and non-religious beliefs and affiliations. This Court's decisions repeatedly confirm that state discrimination between religion and non-religion violates the Establishment Clause, which "guarantee[s] religious liberty and equality to the 'infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *County of Allegheny* v. *American Civil Liberties Union*, ___ *U.S.* ___, *109 S.Ct. 3086, 3099 (1989) (quoting Wallace* v. *Jaffree*, 472 U.S. 38, 52 (1985)).

This case plainly falls within this Court's decisions holding, in numerous contexts, that the government must be neutral between religion and non-religion:

> —Bible reading or prayer in public schools, *Abington School District* v. *Schempp*, 374 U.S. 203, 218, (1963) (state is to be "neutral in its relations with groups of believers and non-believers"); *Wallace* v. *Jaffree*, 472 U.S. at 53 ("the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all");
>
> —conscientious objection exemptions from military conscription, *Gillette* v. *United States*, 401 U.S. 437, 450 (1971) (First Amendment "prohibits government from abandoning secular purposes in order to put an imprimatur on one religion, or on religion as such") and *Welsh* v. *United States*, 398 U.S. 333, 356 (1970) (Harlan, J., concurring) (state "cannot draw the line between theistic . . . and secular beliefs");
>
> —state promotion of creationism, *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968) (state "may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite");
>
> —religious requirements for notaries public, *Torcaso* v. *Watkins*, 367 U.S. 488, 495 (1961) (state cannot "pass laws or impose requirements which aid all religions as against non-believers");
>
> —state aid to public schools, *School District of Grand Rapids* v. *Ball*, 473 U.S. 373, 382 (1985) (First Amend-

ment requires "the government to maintain a course of neutrality among religions, and between religion and nonreligion");

—state aid to families with children in religious schools, *Everson*, 330 U.S. at 16 (state "cannot exclude . . . Non-believers . . . or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation");

—state aid to families with dependent children, *Bowen* v. *Kendrick*, 487 U.S. ____, 108 S.Ct. 2562, 2573 (1988) (Constitution promotes "maintenance of 'a course of neutrality among religions, and between religion and non-religion' ");

—tax exemptions limited to religious publications, *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. ____, 109 S.Ct. 890, 896 (1989) ("the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally").[6]

Despite the unchallenged evidence that petitioner's position in the AHA is the secular equivalent of a religious minister, Virginia denied petitioner and AHA members rights that would have been accorded to recognized "conventional" religious denominations. To condition rights upon religious requirements unquestionably violates the fundamental principle of religious neutrality that is embodied in the First Amendment.[7]

2. Virginia's marriage solemnization statute corresponds in all material respects to the laws of every other state and

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[6] Although the *Texas Monthly* decision commanded only a plurality of this Court, the fundamental principle of non-discrimination between religion and non-religion was expressly reaffirmed in the concurrence. Justices Blackmun and O'Connor agreed that there is a "previously settled notion that government may not favor religious belief over disbelief." *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. at ____, 109 S.Ct. at 906 (Blackmun, J. concurring).

[7] Section 20-23 therefore violates each of the three prongs of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

the District of Columbia. All states authorize two categories of persons to perform marriages: specified governmental officials[8] (usually judges and justices of the peace) and religious ministers.[9] None provides religiously neutral criteria

[8] Ala. Code 30-1-7 (1988); Alaska Stat. 25.05.261 (1988); Ariz. Rev. Stat. Ann 25-124 (1988); Ark. Stat. Ann. 9-11-213 (1987); Cal. Civil Code 4205 (West 1989); Col. Rev. Stat 14-2-109 (1987); Conn. Gen. Stat. Ann. 46b-22 (West 1989); Del. Code Ann. tit. 13, 106 (1988); D.C. Code Ann. 30-106 (1988); Fla. Stat. Ann. 741.07 (West 1986); Ga. Code Ann. 19-3-30 (Michie 1989); Haw. Rev. Stat. 572-12 (1985); Ill. Rev. Stat. ch. 40, para. 209 (1987) Marriage and Dissolution of Marriage Act; Ind. Code Ann. 31-7-5-1 (Burns 1986); Iowa Code Ann. 595.10 (West 1989); Kan. Stat. Ann. 23-116 (1987); Ky. Rev. Stat. Ann. 402.050 (1984); La. Rev. Stat. Ann. 202 (West 1939); Me. Rev. Stat. Ann. tit. 19, 121 (1988); Md. Family Law Code Ann. 2-406 (1984); Mass. Ann. Laws ch. 207, 38 (Law. Co-op 1989); Mich. Comp. Laws Ann. 551.7 (West 1988); Minn. Stat. Ann. 517.04 (West 1989); Miss. Code Ann. 93-1-17 (1988); Mo. Ann. Stat. 451.100 (Vernon 1986); Mont. Code Ann. 40-1-301 (1988); Neb. Rev. Stat. 42-108 (1988) Nev. Rev. Stat. 122.062 (1985); N.H. Rev. Stat. Ann. 457:31 (1983); N.J. Stat. Ann. 37:1-13 (West 1989); N.M. Stat. Ann. 40-1-2 (1988); N.Y. Dom. Re. Law 11 (McKinney); N.C. Gen. Stat. 51-1 (1988); N.D. Cent. Code 14-03-09 (1989); Ohio Rev. Code Ann. 3101.8 (Anderson 1989); Okla. Stat. Ann. tit. 43, 7 (West 1989); Or. Rev. Stat. 106.120 (1984); Pa. Stat. Ann. tit 48, 1-13 (Purdon 1989); R.I. Gen Laws 15-3-5 (1988); S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); S.D. Codified Laws Ann. 25-1-30 (1989); Tenn. Code Ann. 36-3-301 (1988); Tex. Fam. Code Ann. 1.83 (Vernon 1989); Utah Code Ann. 30-1-6 (1989); Vt. Stat. Ann. tit 18, 5145 (1987); Va. Code Ann. 20-25 (1988); Wash. Rev. Code Ann. 26.04.050 (1989); W.Va. Code 48-1-12 (1986); Wis. Stat. Ann. 765.16 (West 1988); Wyo. Stat,. 20-1-106 (1987).

[9] Ala. Code 30-1-7 (1988); Alaska Stat. 25.05.261 (1988); Ariz. Rev. Stat. Ann 25-124 (1988); Ark. Stat. Ann. 9-11-213 (1987); Cal. Civil Code 4205 (West 1989); Col. Rev. Stat 14-2-109 (1987); Conn. Gen. Stat. Ann. 46b-22 (West 1989); Del. Code Ann. tit. 13, 106 (1988); D.C. Code Ann. 30-106 (1988); Fla. Stat. Ann. 741.07 (West 1986); Ga. Code Ann. 19-3-30 (Michie 1989); Haw. Rev. Stat. 572-12 (1985); Idaho Code 32-303 (1988); Ill. Rev. Stat. ch. 40, para. 209 (1987) Marriage and Dissolution of Marriage Act; Ind. Code Ann. 31-7-5-1 (Burns 1986); Iowa Code Ann. 595.10 (West 1989);

for defining "ministers." Some laws even go so far as to limit authorization to Christians,[10] Protestants,[11] or "Protestants, Catholics, and Jews."[12]

Because literal application of these laws would violate the Establishment Clause, it appears that a number of states are routinely allowing persons who are not "religious ministers" to perform marriages under the marriage solemnization statutes. Indeed, petitioner himself has performed marriages in Pennsylvania, Maryland, and the District of Columbia. Virginia, however, declined the opportunity to interpret and apply its law in a constitutional manner. It therefore stands in conflict with the decisions of this Court—and the practice of many of its sister states—that honor the principle of

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Kan. Stat. Ann. 23-116 (1987); Ky. Rev. Stat. Ann. 402.050 (1984); La. Rev. Stat. Ann. 202 (West 1989); Me. Rev. Stat. Ann. tit. 19, 121 (1988); Md. Family Law Code Ann. 2-406 (1984); Mass. Ann. Laws ch. 207, 38 (Law. Co-op 1989); Mich. Comp. Laws Ann. 551.7 (West 1988); Minn. Stat. Ann 517.04 (West 1989); Miss. Code Ann. 93-1-17 (1988); Mo. Ann. Stat. 451.100 (Vernon 1986); Mont. Code Ann. 40-1-301 (1988); Neb. Rev. Stat. 42-108 (1988) Nev. Rev. Stat. 122.062 (1985); N.H. Rev. Stat. Ann. 457:31 (1983); N.J. Stat. Ann 37:1-13 (West 1989); N.M. Stat. Ann. 40-1-2 (1988); N.Y. Dom. Rel. Law 11 (McKinney); N.C. Gen. Stat. 51-1 (1988); N.D. Cent. Code 14-03-09 (1989); Ohio Rev. Code Ann. 3101.8 (Anderson 1989); Okla. Stat. Ann. tit. 43, 7 (West 1989); Or. Rev. Stat. 106.120 (1984); Pa. Stat. Ann. tit 48, 1-13 (Purdon 1989); R.I. Gen Laws 15-3-5 (1988); S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); S.D. Codified Laws Ann. 25-1-30 (1989); Tenn. Code Ann. 36-3-301 (1988); Tex. Fam. Code Ann. 1.83 (Vernon 1989); Utah Code Ann. 30-1-6 (1989); Vt. Stat. Ann. tit 18, 5145 (1987); Va. Code Ann. 20-23 (1988); Wash. Rev. Code Ann. 26.04.050 (1989); W.Va. Code 48-1-12 (1986); Wis. Stat. Ann. 765.16 (West 1988); Wyo. Stat. 20-1-106 (1987).

[10] Ala. Code 30-1-7 (1988); Ark. Stat. Ann. 9-11-213 (1987); Idaho Code 32-303 (1988).

[11] Mich. Comp. Laws Ann. 551.7 (West 1988); Nev. Rev. Stat. 122.062 (1985); Vt. Stat. Ann. tit 18, 5145 (1987).

[12] S.C. Code Ann. 20-1-20 (Law. Co-op. 1988); Utah Code Ann. 30-1-6 (1989); W.Va. Code 48-1-12 (1986).

religious neutrality in such matters of importance to people's lives.

3. The Free Exercise Clause also prohibits states from establishing religious qualifications for persons who perform state functions. States are prohibited from inquiring into the "truth or verity" of a person's religious beliefs. *United States* v. *Ballard*, 322 U.S. 78, 86 (1944). That principle is the subject of one of this Court's most eloquent affirmations of the First Amendment:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia State Bd. of Educ. v. *Barnette*, 319 U.S. 624, 642 (1943).

This Court has squarely held that a state which imposes religious requirements upon the performance of state functions, such as those of a notary public, violates the Free Exercise Clause by invading a person's "freedom of belief and religion . . . ." *Torcaso* v. *Watkins*, 367 U.S. at 496. So here states cannot impose religious affiliation and belief requirements upon persons who solemnize marriages.

CONCLUSION

For the foregoing reasons, the Court should grant the Writ of Certiorari and review the decision below.

Respectfully submitted,

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September 6, 1989

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 8th day of June, 1989.

In Re: Application of Roy R. Torcaso to Celebrate Marriages Record No. 890339

From the Circuit Court of Prince William County

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

DAVID B. BEACH, *Clerk*

By: */s/*
Deputy Clerk

VIRGINIA

IN THE CIRCUIT COURT
of
PRINCE WILLIAM COUNTY

IN RE: APPLICATION OF ROY R. TORCASO TO CELEBRATE MARRIAGES

ORDER

The application of Roy R. Torcaso for an order authorizing him to perform marriage ceremonies, pursuant to Section 20-23 of the Code of Virginia, was received and considered by this Court.

Finding that said application does not meet any of the requirements of Section 20-23 of the Code of Virginia, the same is hereby denied.

Entered this 16th day of December, 1988.

/s/ PERCY THORNTON, JR.
PERCY THORNTON, JR., *Judge*

/s/ H. SELWYN SMITH
H. SELWYN SMITH, *Judge*

/s/ HERMAN A. WHISENANT, JR.
HERMAN A. WHISENANT, JR., *Judge*

/s/ FRANK A. HOSS, JR.,
FRANK A. HOSS, JR., *Judge*

No. 89-375

In The

Supreme Court of the United States

October Term, 1989

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

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QUESTION PRESENTED

Whether Virginia's exemption of ordained ministers from posting a $500 bond to celebrate marriages violates the Establishment Clause or the Free Exercise Clause of the First Amendment?

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT: REASONS FOR DENYING THE WRIT 2

1. Virginia Code § 20-23 Does Not Violate the Establishment Clause of the First Amendment 2

2. Virginia Code § 20-23 Does Not Violate the Free Exercise Clause of the First Amendment 6

CONCLUSION 6

TABLE OF AUTHORITIES

Page(s)

CASES

Boddie v. Connecticut, 401 U.S. 371 (1971) 3

Cramer v. Commonwealth, 214 Va. 561, 202 S.E.2d 911, *cert denied*, 419 U.S. 875 (1974) 3, 4

In Re Application of Ginsburg, 236 Va. 165, 372 S.E.2d 387 (1988) 4, 5

Lemon v. Kurtzman, 403 U.S. 602 (1971) ..... *passim*

Torcaso v. Watkins, 367 U.S. 488 (1961) 6

Texas Monthly, Inc. v. Bullock, 489 U.S. ___, 109 S.Ct. 890 (1989) 5

Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) 5

OTHER

§ 20-23 of the Virginia Code ..... *passim*

§ 20-25 of the Virginia Code 2, 3

§ 20-26 of the Virginia Code 2, 3

STATEMENT OF THE CASE

Petitioner Roy R. Torcaso ("Torcaso") is a member of the American Humanist Association ("AHA"), a non-profit educational and philosophical organization. The members of AHA generally do not hold any religious beliefs. Members looking for guidance who do not belong to a traditional church are counseled by AHA members who are "Humanist Counselors AHA." Torcaso holds the title of Counselor, conferred by the Division of Humanist Counseling, a subordinate branch of AHA.

In November of 1988, Torcaso applied to the Circuit Court of Prince William County, Virginia, for authorization to perform wedding ceremonies pursuant to § 20-30 of the Code of Virginia. This statute provides that a minister of any religious denomination will be authorized to perform marriages upon proof of ordination. His application was denied because Torcaso failed to establish that he was an ordained minister as required by the statute.

Torcaso challenges the Virginia statute as violative of the Establishment and Free Exercise Clauses of the First Amendment of the United States Constitution.

SUMMARY OF ARGUMENT

Virginia Code § 20-23 does not impermissible discriminate between religious and secular wedding officiants. The Code section survives attack under the three-prong test developed by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

The Commonwealth has a legitimate interest in regulating the institution of marriage. That interest entitles the Commonwealth to require that those individuals who celebrate marriages be accountable for their actions. Accordingly, it is not unreasonable to require that any one authorized to celebrate marriages give bond in the penalty of $500 with surety. Virginia law requires such a bond of persons who are not ministers of religious denominations (§ 20-25) and by persons who are members of religious societies having no ordained ministers (§ 20-26). Ordained ministers are exempt form the bond requirement simply because Virginia recognizes that the fact of ordination creates a presumption that the officiant is trustworthy and responsible. This statutory exemption, having a valid secular purpose, does not violate the Establishment Clause of the First Amendment, nor does it interfere with one's free exercise of religious beliefs.

ARGUMENT: REASONS FOR DENYING THE WRIT

1. Virginia Code § 20-23 Does Not Violate the Establishment Clause of the First Amendment

Virginia Code § 20-23 states that when a minister produces proof of ordination by his congregation, the clerk of the court may authorize him to celebrate the rites of matrimony without posting a bond. Section 20-25 permits persons other than ministers of religious organizations to perform marriages upon the filing of a $500 bond with surety. Similarly, § 20-26 of the Virginia Code allows marriages to be celebrated by a member of a religious order that has no minister upon the filing of a $500 surety bond.

The Supreme Court developed a three-prong test to determine if a law withstands an Establishment Clause challenge in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Applying the *Lemon* analysis, Torcaso's challenge fails.

The initial inquiry in a *Lemon* analysis is whether the challenged legislation has a secular purpose. There is no constitutional violation if the state's purpose is not to promote religion. This Court in *Boddie v. Connecticut*, 401 U.S. 371 (1971), recognized that marriage involves interests of basic importance in our society and that the states have a valid interest in regulating the institution of marriage. The Virginia laws governing the appointment of those who may celebrate marriage further its legitimate and secular interest of ensuring that marriages are properly celebrated and recorded.

Virginia has chosen to further its interest in the institution of marriage by requiring that an individual who wishes to officiate a marriage ceremony either be an ordained minister of a religious organization or post a $500 bond. The Virginia Supreme Court has held that the exemption from bonding provided by § 20-23 for ordained ministers simply recognizes that these individuals are presumptively responsible and, therefore, do not need to be bonded. *Cramer v. Commonwealth*, 214 Va. 561, 202 S.E.2d 911, *cert. denied*, 419 U.S. 875 (1974).

The statutory scheme of § 20-23, § 20-25 and § 20-26 furthers Virginia's legitimate concern that responsible individuals perform marriages, regardless of their religion. That these statutes exempt those selected as leaders of religious denominations from bonding, but imposes a

bond requirement on all others, *including members of religious societies having no ordained minister,* demonstrates the secular purpose of the statutes.

An ordained minister is a person selected in accord with the ritual, bylaws or discipline of a society. He is set apart from the rest of the membership by his position. *In Re Application of Ginsburg,* 236 Va. 165, 372 S.E.2d 387 (1988). Ministers are presumptively individuals of integrity by virtue of their selection to that position of authority.

There is no discriminatory intent in the statute to advance one organization's minister ahead of another. It is a purely secular intent to be certain that the wedding ceremony will be performed by a responsible individual. Proof of ordination as a religious minister *or* the posting of a $500 bond is all the Commonwealth requires. No inquiry is made into religious beliefs.

The second prong of the *Lemon* test is the effect test: the primary effect of the legislation must neither promote nor inhibit religion. The Virginia laws neither promote nor inhibit any religion. The Virginia Supreme Court has construed § 20-23 as not having the purpose or effect of preferring one religious sect over another. *Crammer* at 566, 202 S.E.2d at 915. The question to be asked is whether, regardless of the government's's actual purpose, the challenged statute conveys a message of endorsement or rejection. The application of § 20-23 negates any discriminatory effect. The statute does not use the terms "ordination" and "communion" in the ecclesiastical sense

because the state has no concern with the religious aspect of the ceremony. The Virginia Supreme Court has suggested that "ordained" as used in the statute means "appointed" and "communion" means "mutual participation." *Ginsburg* at 167, 372 S.E.2d at 389. Also, "minister" is used in the sense of one who is set apart from the membership as a leader. *Id.*

The exemption from bond under § 20-23 neither promotes nor impedes any religion because the certification requirement is imposed on all ministers. The bonding requirement is not waived for religious societies which do not ordain (i.e., select as a responsible leader) a minister. The statute satisfies the second prong of the *Lemon* test because its effect is not to promote or inhibit religion.

The third consideration in a *Lemon* analysis is whether the legislation fosters excessive government entanglement with religion. Again, the statute withstands the challenge. It is impossible for government to govern without some minimal involvement with religion. It is permissible for government policies with secular objectives to incidentally benefit religion. *Texas Monthly, Inc. v. Bullock*, 489 U.S. ___, 109 S.Ct. 890 (1989). Government regulation must reflect "benevolent neutrality" towards religious organizations. *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970). The Virginia statutory scheme reflects benevolent neutrality to religion while avoiding any unnecessary inquiry into religious beliefs. The Code only asks for "proof of ordination" and of "being in regular communion" with the religious society of which the applicant is

a member to establish that the individual is respected by his congregation.

2. Virginia Code § 20-23 Does Not Violate the Free Exercise Clause of the First Amendment

Petitioner's claim of a violation of the Free Exercise Clause also fails. The First Amendment prohibits the enactment of laws that interfere with an individual's free exercise of religion. The Virginia laws do not interfere with the free exercise of religion; they merely require that any individual who wishes to perform marriage must be accountable for his actions. The statutes do not require petitioner to affirm or deny any religious beliefs. *Compare Torcaso v. Watkins,* 367 U.S. 488 (1961). Anyone seeking to celebrate marriage has only to furnish proof that he is in a leadership position in his organization or post a $500 bond. These requirements do not interfere with an individual's free exercise of his religious belief.

CONCLUSION

Petitioner's application to perform marriages in Virginia was properly denied because he did not meet the qualifications of Virginia law. The denial is not a violation of either the Establishment Clause or the Free Exercise Clause because the statutory requirements serve a valid legislative purpose of insuring that the memorializing and recording of marriage ceremonies is performed by responsible individuals.

The Commonwealth has a legitimate interest in the performance of valid marriages. The code provision protects that interest. Accordingly, the Commonwealth asks that the petition be denied.

Respectfully submitted,

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Date: October 5, 1989

REPLY BRIEF

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-375

ROY R. TORCASO,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The Commonwealth of Virginia's brief in opposition not only misstates the provisions of the statutes that are challenged, but also defends those laws in terms that clearly reveal Virginia's preferential treatment of traditionally "religious" wedding celebrants. There are three respects in which Virginia's brief confirms that a writ of certiorari should be granted.

First, the centerpiece of the Commonwealth's argument for denying the writ is the assertion that Virginia merely imposes a $500 surety bond requirement upon wedding officiants who are not ordained ministers. (Opp. 2-3.) This contention is mistaken. Virginia law denied petitioner (and other humanists) the opportunity to have petitioner celebrate

weddings in the Commonwealth *under any circumstances.* He is unable to post a $500 bond and qualify under Section 20-25 of the Virginia Code because he is not a Virginia resident.[1] Nor can the American Humanist Association ("AHA") file such a bond for its members because it is not a "religious society" qualifying under Section 20-26 of the Virginia Code. By contrast, Section 20-23 of the Virginia Code enables ordained religious ministers to celebrate weddings without posting bond and without regard to their residency.

Second, Virginia's brief in opposition confesses the very preference for religious over non-religious affiliations that this Court's decisions forbid. The Commonwealth asserts that "ordination creates a presumption that the officiant is trustworthy and responsible" (Opp. 2) and that "[m]inisters are presumptively individuals of integrity by virtue of their selection to that position of authority" (Opp. 4). Only a prejudice against non-religious wedding celebrants can explain why Virginia does not likewise presume the trustworthiness and integrity of petitioner, who is an accredited Humanist Counsellor—the AHA's counterpart of an ordained clergyman.

Third, the Commonwealth's passing references to the three-part test of *Lemon v. Kurtzman,* 403 U.S. 602 (1971), similarly betray a misunderstanding of the pro-religious discrimination at issue. We agree that the Commonwealth may justifiably require that "responsible individual[s]" perform wedding ceremonies, but Virginia has impermissibly pursued that otherwise legitimate secular purpose by presuming that religious ministers can—but that Humanist Counsellors such as petitioner cannot—be a "responsible individual." (Opp. 4.) That being so, it is hard to credit the Commonwealth's assertion that the "challenged statute [does not] convey a

[1] Section 20-25 requires that the wedding celebrant be a resident of a "county or city" in which the wedding is to be performed.

message of endorsement or rejection." *(Id.)* And it is most certainly an undesirable government entanglement with religion for Virginia to seize upon religious affiliation as a test for determining what persons and organizations are sufficiently trustworthy and responsible to celebrate weddings.

CONCLUSION

For the foregoing reasons, the Court should grant the petition, issue a writ of certiorari, and reverse the decision below.

Respectfully submitted,

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